(2)

Supreme Court, U.S.
FILED

No. 05 189 JUL 14 2005

OFFICE OF THE CLERK

In The Supreme Court of the United States

Jacob M. Orndorf,

Petitioner,

v.

Paul Revere Life Insurance Company

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Jon Holder
104 Main Street
P.O. Box 238
Ellsworth, ME 04605-0238
(207) 664-0299
Counsel for Petitioner

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

QUESTIONS PRESENTED

1. May ERISA actions properly be treated as analogous to appeals from Federal Administrative Agencies when a plan beneficiary is entitled to de novo review under *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 110 (1989)?

2. May a Court properly deny discovery and refuse to admit supplemental evidence in support of an ERISA beneficiary's denied claim when de novo review is appropriate under *Firestone*?

3. Do the recent revelations of systemic improprieties reflected in the processing of ERISA claims by Paul Revere Life Insurance Company and other insurers in processing ERISA claims merit greater judicial scrutiny than accorded below?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Statutes and Rules of Court Involved 1

Statement of the Case 2

Argument 4

Conclusion 12

Opinion of the U.S. Court of Appeals for the First
In Orndorf v. Paul Revere Life Insurance Company A-1

Report of the Multistate Market Conduct Examination
Of Paul Revere Life Insurance Company et. al. A-39

TABLE OF AUTHORITIES

Page(s)

Cases:

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986) 10

Black and Decker Disability Plan v. Nord,
538 U.S. 822 (2003) 4

Brentwood Academy v. Tennessee Athletic Association,
531 U.S. 288 (2001) 10

Firestone Tire and Rubber Co. v. Bruch,
489 U.S. 101 (1989) 4, 5, 6, 10, 13

Gibson v. Berryhill,
411 U.S. 564 (1973) 10

Herzberger v. Standard Insurance Co.,
205 F. 3rd 327, 332 (7th Cir. 2000) 6, 7

Kearney v. Standard Ins. Co.,
175 F. 3rd 1084 (9th Cir. 1999) 7, 8

Ray v. Unum Life Ins. Co. of America,
314 F. 3rd 482 (10th Cir. 2002) 7

Shaw v. Connecticut General Life Ins. Co.,
353 F. 3rd 1276, 1287 (11th Cir. 2003) 7

Tumey v. Ohio,
237 U.S. 510 (1929) 10

Ward v. City of Monroeville,
409 U.S. 57 (1971) 10

Statutes:

28 U.S.C. § 1254 1

29 U.S.C. § 1132 (a) 1, 5

29 U.S.C. § 1132 (e) 1

29 U.S.C. § 1133 (b) 9

42 U.S.C. 405 (g) 7

Other Authorities:

Fed. R. Civ. P. 1 ..... 2, 5

Fed. R. Civ. P. 2 ..... 2, 5

Fed. R. Civ. P. 56 (c) 5

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The April 15, 2005 opinion of the Court of Appeals which is reported at 404 F. 3rd 510 (1st Cir. 2005) is set out in pp A1-38 of the Appendix to this petition.

JURISDICTION

The Court of Appeals entered its opinion and order on April 15, 2005. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254. Federal jurisdiction is conferred in the first instance by the Employee Retirement Income Security Act of 1974 (ERISA) at 29 USC § 1132 (e).

STATUTES AND RULES OF COURT INVOLVED

29 U.S.C. § 1132 reads in pertinent part:

A civil action may be brought

(1)by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights

> to future benefits under the terms of the plan;

The pertinent Federal Rules of Civil Procedure are:

> **Rule 1. Scope and Purpose of Rules**
>
> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.
>
> **Rule 2. One Form of Action**
>
> There shall be one form of action to be known as "civil action".

STATEMENT OF THE CASE

The critical facts in this case are as they appear in the opinion of the First Circuit. The factual skeleton is that Jacob Orndorf pursued a claim for disability benefits under an insurance policy issued to his former employer by Paul Revere Life Insurance Company. Paul Revere denied his claim for extended benefits and Orndorf then turned to federal court for redress. The district court denied Orndorf's request for discovery to supplement Paul Revere's file and for an evidentiary hearing or trial and ruled for Paul Revere on summary judgment, notwithstanding conflicting medical evidence contained in the record compiled by the insurance company, called throughout these proceedings the "administrative record". De novo review was conceded to be the proper standard. Orndorf appealed.

On appeal Orndorf argued two points central to consideration of this petition. First he maintained that he was entitled to discovery in the same manner that any other litigant in federal court would be entitled to discovery under the Federal Rules of Civil Procedure. Secondly, Orndorf maintained that the resolution of his case on summary judgment in the face of conflicting medical evidence was improper when the standard of review was concededly de novo.

The Court of Appeals rejected both of these claims saying:

> The review utilized both by this Court and the District Court in this ERISA case differs in one important aspect from the review in an ordinary summary judgment case. As we noted in *Liston v. Unum Corp.*, 330 F. 3rd 19 (First Cir. 2003), in an ERISA case where review is based **only on the administrative record** before the plan administrator and is an ultimate conclusion as to disability to be drawn from the facts **summary judgment is simply a vehicle for deciding the issue**." (Emphasis supplied.) *Orndorf,* 404 F. 3rd at 517; A-16.

The justification below for denying discovery to the Petitioner (in addition to denying the Petitioner's attempt to supplement the record) makes it plain that the court viewed civil actions under ERISA as analogous to, for example, judicial review of decisions resolving disability claims by the Social Security Administration under the Social Security Act. The court said:

> The decision to which judicial review is addressed is the final ERISA administrative decision. It would offend interests in finality and exhaustion of administrative procedures required by ERISA to shift the focus from that decision to a moving target by presenting extra administrative record evidence going to the substance of the decision." *Orndorf,* 404 F. 3rd at 519; A-21.

ARGUMENT

Left unanswered by the First Circuit is a question of extraordinary importance affecting hundreds of thousands of Americans with disability claims governed by ERISA.[1] What legal doctrine or set of legal principles justifies investing private insurance companies with authority analogous to that exercised by federal agencies when insurers have a financial interest in denying claims?

The decision below is in direct conflict with the decision of this Court in *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 115 (1989). The opinion of the First Circuit below represents a trend in some circuits away from anything that could reasonably be called de novo

---

[1] According to a brief submitted in support of the petitioner in the *Black & Decker Disability Plan v. Nord* 538 U.S.822 (2003) UnumProvident Corporation asserted that its companies (of which Paul Revere is one) collectively receive approximately 400,000 new disability claims each year. (Brief at 2.) According to the Report of the Multistate Market Conduct Examination investigating complaints of improprieties at the UnumProvident companies, one subsidiary of UnumProvident (which actually uses common claims processing centers) showed 70,000 pending claims for the year 2002 and 65,000 closed claims the majority of which would have been group claims covered by ERISA. A39-70.

review. Here the distinction between de novo review and deferential review established in *Firestone* has disappeared. The restriction of review to the "administrative record" assembled by Paul Revere represents a clear abridgement of the unitary concept underlying the Federal Rules of Civil Procedure and their application to those entitled to bring a civil action. Fed. R. Civ. P. 1 and 2. Nor is there any limit on the explicit statutory right of a plan beneficiary to pursue a civil action pursuant to 29 U.S.C. § 1132 (a) for benefits protected by ERISA.

Even more telling is the First Circuit's assessment of the role of federal courts in addressing an "administrative record" with conflicting medical evidence bearing on the ultimate issue of disability. According to the First Circuit:

> Alternatively, Orndorf may be arguing that a court faced with an administrative record with **conflicting medical opinions** should then hold a trial with witnesses to resolve the disputes. He filed a motion to that effect, which was denied by the district court. The court was correct to deny the motion. Trial is not warranted because the record shows one doctor's diagnosis disagrees with another's and the fact that judicial review is de novo does not itself entitle a claimant to a trial or to put on new evidence. 404 F. 3rd at 518; A-19 (Emphasis added).

The Federal Rules of Civil Procedure could not be more explicit in stating that summary judgment may be awarded only when there is no genuine issue of material fact. Fed. R. Civ. P. 56 (c). The First Circuit's curb on the availability of the protections afforded by the usual application of the Federal Rules of Civil Procedure necessarily represents a shift in authority from the court to

Paul Revere in this instance, and commonly to private insurance companies in numerous other instances. Even when a court claims to be reviewing the administrative record de novo, the shift in evidence gathering authority and in the initial weighing of evidence to private insurers is certainly procedurally deficient and may ultimately open ERISA to challenges based on established constitutional due process principles. There was here no opportunity for a hearing before a neutral decision-maker at the so-called administrative stage vested in Paul Revere (as well as in other insurance companies). Nor was there any opportunity for discovery to challenge evidence Paul Revere gathered in support of denial.[2]

As Judge Richard A. Posner pointed out in *Herzberger v. Standard Insurance Co.*, 205 F. 3rd 327, 332 (7th Cir. 2000) in arguing the unfairness of an ad hoc utilization of an administrative law paradigm:

> What may have mislead Courts in some cases is the analogy between judicial review of an ERISA plan administrators decision to deny disability benefits and judicial review of the denial of such benefits by the Social Security Administration.
>
> Judicial review of the latter sort of denial is of course deferential, and it is natural to suppose that it should be deferential in the former case as well. But the analogy is imperfect, quite apart from its having been implicitly rejected by the Supreme Court in *Firestone Tire and Rubber Co. v. Bruch* when it determined that the default standard of review in ERISA cases is

---

[2] The very real biases in Paul Revere's claims practices are discussed below and were revealed subsequent to the litigation of this case.

> plenary review, and quite apart from the fact that the Social Security Statute specifies deferential ('substantial evidence') review. 42 U.S.C. § 405 (g).
>
> The Social Security Administration is a public agency that denies benefits only after giving the applicant an opportunity for a full adjudicative hearing before a judicial officer, the administrative law judge. The procedural safeguards thus accorded, designed to ensure a full and fair hearing, are missing from determinations by plan administrators.

The court in *Herzberger,* of course, remanded the cases before it for the plenary review it felt was mandated by the decision of this Court in *Firestone.* Other circuits as well seem to be in conflict with the First Circuit's decision below. *Shaw v. Connecticut General Life Ins. Co.* 353 F. 3rd 1276, 1287 (11th Cir. 2003) expressly held that factual conflicts defeat resolution by summary judgment and warrant remand for a bench trial when the appropriate standard of review is de novo. The Tenth Circuit in *Ray v. Unum Life Ins. Co. of America,* 314 F. 3rd 482, 488 (2002 only) ordered remand under a de novo standard of review to allow "the district court to consider such additional evidence as in its discretion it finds necessary for adequate de novo review including court appointed expert reports if it determines them helpful.

The decision in *Ray* really illustrates why this Court should revisit the meaning of de novo review under *Firestone.* It is because of the confusion in lower courts. Decisions around the circuits most often take confused positions somewhere between *Shaw* and *Orndorf.* Perhaps the most striking example of this confusion is demonstrated by an en banc decision in *Kearney v. Standard Insurance Company*, 175 F. 3rd 1084 (9th Cir. 1999). The court